

Son Hoang Nguyen, P-07044
Old Folsom State Prison
POB 715071
Represa, Ca. 95671-5071

Petitioner In Propria Personam

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THE U.S. DISTRICT COURT
NORTHERN DISTRICT, CALIFORNIA

CV

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3353

(PR)

Son Hoang Nguyen,
Petitioner,
vs.

John Tilton, Director of the
California Dep't of
Corrections and Rehab.
Respondent.

Case Number: _____

STATEMENT OF FACTS IN SUPPORT
OF GROUNDS OF THE FEDERAL
PETITION **E-filing**

I.
STATEMENT OF FACTS

A.
THE SCENE

The Thuy HounG Cafe (hereinafter 'Cafe') is located in the strip mall at San Felipe and Aborn in San Jose, and is frequented by Vietnamese teenagers. On the afternoon and early evening of May 22, 1996, among the Vietnamese youth gathered in and about the Cafe were Son Nguyen (petitioner), co-defendant Dung The Pham (Dung or CD), Thanh Ha Nguyen (Cindy), Tien Ha (Mole), Tuan Hoang (Tuan), Vu Nguyen (Vu), Hung Tran (Hung), Phuong Chu (Phuong), Mai Hoang (Mai), Nhue Giang (Louie or Four Eyes), Linh The Vo (Samantha), and Dong Chi.

The Cafe offered karaoke, video games, and non-alcoholic drinks. (RT 821(4-13), 994(21)-995(17), 997(1-19), 1146(3-15), 1193(19-21), 1266(12-24), 1425(23-25), 1503(24)-1504(3), 1889(6-21).) The lights there were low and the music was loud. (RT 764(19)-165(10), 991(18)-992(5), 1050(19)-1051(6), 1156(8)-1157(20), 1361(15)-1362(5), 1425(26)-1426(1).) An E-Z Market (also called the Liquor Store) in the strip mall was visited by many of the Vietnamese youth who frequented the Cafe. (RT 818(20-28), 839(24)-840(14), 1186(14-21), 1187(1-22), 1306(22)-1308(22), 1463(23)-1464(11).)

Sometime between 7:00 & 7:30 that evening a person later identified as Tong Van Nguyen was seen being chased through the parking lot in front of the Cafe by two men with guns. (RT 199(5)-201(9) [victim's brother John Nguyen], RT 2113(25)-2120 [eyewitness Jim Duncan], 2466(25)-2469(18) [eyewitness Willie

1 Louis East].) Tong Nguyen was apparently holding a pipe or stick
 2 of some sort. (RT 2467(3-26) [Willie East], 153(7-13) [an officer
 3 found a pipe 20 feet from victim]; CT 832(20-21) [Mole said he
 4 shot victim because he came at him with a stick].) Both of his
 5 pursuers apparently fired (RT 2148(17)-2149(4) [Jim Duncan heard
 6 two distinctly different calibers], 2474(24)-2475(10) [Wille East
 7 heard two types of shots]), though one man was perceived as the
 8 primary shooter. (RT 2202(27)-2203(5) & 2113(25)-2114(24) [Jim
 9 Duncan]; 2226(1-4), 2230(22-24), & 2232(1-17) [Elaine Duncan].)

10 The State conceded at trial that victim Tong Van Nguyen was
 11 shot and killed by Mole. (RT 2818(28)-2819(12), 2868(2-7),
 12 3016(25)-3017(6).) Mole fired the "death gun". (RT 2819(8).)
 13 The second shooter was determined by the jury to be co-defendant
 14 Dung Pham. (RT 3056(21)-3057(5) [the State asks the jury to find
 15 true the "use enhancement" as to Dung Pham because he was the
 16 second shooter]; RT 3111(21)-3112(3) [the jury's verdict finds
 17 true the personal use of a firearm enhancement].) Petitioner was
 18 found responsible for the conduct of Mole, determined to be first
 19 degree murder, under the vicarious liability theories of conspir-
 20 acy and/or aiding and abetting.

21 B.

22 THE STATE'S HEAVY RELIANCE ON THE 23 POLICE INTERVIEWS OF CERTAIN WITNESSES

24 To support the theories of vicarious liability the State
 25 relies almost exclusively upon evidence presented to the jury in
 26 the form of taped and transcribed interviews of Cindy (CT 739-
 27 888), Vu (CT 902-967), Hung (CT 974-1037), and Tuan (CT 1063-
 28 1110 & 1112-1157). (RT 2808(20-23) [the State argues "The guilt

1 of these defendants lies contained within those interviews, those
 2 tough interviews by police officers,..."]]; see generally RT
 3 2791(17)-2792(13), 2804(12-28), 2806(20)-2808(28), 2810(27)-
 4 2811(3), 3008(28)-3009(2), 3012(28)-3013(6), 3029(2)-3035(20),
 5 3039(6)-3046(24).) Because of the State's heavy reliance upon
 6 these transcripts they will be summarized herein at length.

7
 8 C.
 9 THE SIGNIFICANCE OF THE HIGHLIGHTING
 10 USED IN THIS STATEMENT OF FACTS

11 The tapes of the police interviews with Cindy, Vu, Hung, and
 12 Tuan were played for the jury, and their transcripts given to the
 13 jury as evidence, completely unredacted. These interviews are
 14 lengthy and the transcripts voluminous. In these interviews
 15 Cindy, Vu, Hung, and Tuan state numerous conclusions, recount
 16 street rumors, and attribute statements to unknown declarants,
 17 all of which should have been ruled inadmissible and redacted.
 18 This inadmissible evidence is subject to a claim of constitutional
 19 error in this petition. Also, this petition raises a sufficiency
 20 of evidence claim. Obviously, it would be improper to consider
 21 evidence admitted in violation of petitioner's constitutional
 22 rights when weighing the sufficiency of the evidence. To facili-
 23 tate the identification of such improperly admitted evidence,
 24 while not impairing the completeness of the Statement of Facts,
 25 petitioner will recount all the evidence admitted at trial, but
 will highlight the inadmissible portions in this fashion.

26 // //
 27 // //
 28 // //

D.
DESCRIPTION OF THE EVIDENCE

1. CINDY NGUYEN

a.
POLICE INTERVIEW

Cindy was interviewed by the police on September 17, 1996, nearly four months after the shooting incident. Cindy said her cousin Kevin told her that he and his friends fought Son and his friends at a store near Silver Creek school after school had let out. (CT 752(15-23), 753(9-21).) According to Kevin's account, Mole and three others fought on Son's side against Kevin and some of his friends. (CT 753(22)-754(10).-) Cindy could not say who Kevin's supporters were. (CT 754(25)-755(3). Kevin explained that Son expressed anger about Kevin's demeaning remarks. (CT 754(12-15).) The fight was, however, not decisive -- at least according to Kevin. No one emerged as a clear winner. (CT 754(17-18).) The combatants disengaged when Kevin started bleeding. (CT 754(17-28).) However, Cindy did not see any of it. She was already on her way home. (CT 753(28).) She heard the story from her cousin sometime later. (CT 754(1).)

Apparently relying on her cousin's statement, she said that her cousin Kevin knew the victim and that Kevin said the victim's name was "Dwong."¹ (CT 842(12-14) Cindy also asserted that "Mole and them said that my cousin went into the white car" that pursued the green Legend out of the mall parking lot after the shooting. (CT 842(18-24).) Cindy stated that she, personally, did not know the victim. (CT 842(12).) Cindy also said that Kevin told her he was not at the Cafe that day. (CT 842(18-24).)

Fn. 1: The victim's name was actually Tong Van Nguyen.

1 On the phone with petitioner, Cindy said her cousin Kevin
2 was talking in the background in a way that petitioner felt was
3 demeaning of him. (CT 747(1-15).) Petitioner was annoyed and
4 told Cindy that she should tell her cousin to "watch out." (CT
5 752(9-10).) Petitioner later told Cindy that he went to her
6 school to "solve problems with your cousin." (CT 752(28).)
7 However, petitioner did not say anything about a fight and
8 provided no other information. (CT 752(24-28).)

9 Cindy was also asked if either petitioner or Mole said
10 anything at the Cafe about having been in a fight with Kevin or
11 anyone else. She said no. (CT 758(9-17).) However, she did
12 recall talking with petitioner, Louie, and Dong Chi outside the
13 Cafe and hearing "them" saying that "the other people might
14 come." (CT 806(18).) She also recalled someone saying "Oh, this
15 guy might be there." However, she did not say that anyone in the
16 group mentioned that they had previously fought with these "other
17 people" or "this guy." (CT 807(1-19).) Her understanding that
18 the people she was with had been fighting with these "other
19 people" apparently continued to be based upon deduction from her
20 cousin's remarks. (CT 752-4, 807(1-19), 758(16-17).)

21 The three guys outside the Cafe said, "What happen if those
22 guy comes?" "What are we gonna do?" (CT 808(9-11).) At that
23 point petitioner said "Oh, I have this" and pulled up his shirt
24 revealing a gun in his waistband. (CT 809(2-7), 860(7-23).) He
25 said he was ready for them if they came. (CT 810(1-28).) And
26 the other guys then said, "Oh, you would dare me do that." (CT
27 808(27-28).) They questioned petitioner sarcastically as to
28 whether he would have the "guts to do it." (CT 810(21), 811(1-

1 2).) Petitioner replied, "Yeah, I could." "If they want it,
2 they can have it." Cindy said petitioner used Vietnamese slang
3 -that meant "if they were ready for it, he'll be ready for it
4 too." (CT 811(15-18).)

5 Mole and Tuan² had not yet arrived and were therefore not
6 privy to this conversation. (CT 810(23-24), 807(18-21), 861(28).)
7 They arrived about 15 minutes after the conversation had conclud-
8 ed. (CT 812(5).) Dung³ was not there yet either. (CT 861(15).)
9 Cindy recalled Mole asking "Where's CD?" And petitioner replying
10 "He didn't come yet." Mole then said "I'll wait for him then."
11 (CT 810(21-22).)

12 When Mole arrived, according to Cindy, he walked over to
13 were petitioner, Louie, Dong Chi, and her were talking outside
14 the Cafe. "They were talking about those guys coming." (CT
15 814.) Petitioner then said, "Oh, come here, I got something" --
16 and showed Mole "the thing." (CT 814.) Mole then said, "Give it
17 to me", and petitioner did. (CT 814-15, 819(21-22), 860-01,
18 864(23-28), 865(2).) Mole looked at the gun and remarked that it
19 was not loaded. (CT 816, 860(23).) Petitioner also verbally
20 acknowledged that it was unloaded. (CT 864(23-28).) Mole said,
21 "what are you guys gonna do?" They responded "We have nothing."
22 Then Mole remarked, "Well, don't worry." (CT 815.)

23
24 Fn. 2: In Cindy's statement to the police, she repeatedly
25 referred to "the guy with the black car", "the black car guy",
and "the black guy." It was stipulated at trial that the person
she was referring to was Tuan Hoang. (RT 804-05.)

26 Fn. 3: Cindy never used the name "Dung" in her interview, but
27 referred to a person nicknamed "CD". Phuong Chu testified that
28 Dung's nickname was CD. (RT 895-96.) Vu Nguyen and Hung Tran
also identified Dung as CD. (RT 1349; CT 1004.)

1 Cindy then walked away from them going to an adjacent liquor
2 store with Phuong. A moment later petitioner followed. Cindy
3 could see that Mole had returned to the green Legend that he had
4 arrived in and was "doing something." (CT 815.) Petitioner no
5 longer had the gun. (CT 860(23).)

6 Petitioner then left the liquor store and headed for the
7 Cafe. Cindy followed about two minutes later. (CT 816.) Mole
8 was still in the green Legend. (CT 816.)

9 Cindy next recollection was, purportedly, seeing Mole stride
10 into the Cafe and announcing, "Hey guys, look what I have" as he
11 pulled up his sweatshirt to flash at "them" the two guns stuck in
12 his waistband. (CT 816-17.) Cindy did not have a line of sight
13 to actually see the guns, but surmised that others in the group
14 did. (CT 854(13).) She recalls someone making a statement, "Oh,
15 those guy might come, you know, guys." (CT 818(28).) "Someone
16 said" what are "you guys gonna do about it." Mole then said,
17 "oh, if they want it, they can have some of this," -- using a
18 Vietnamese work which was a "slang way of like hitting them ...
19 like fighting them." (CT 819(1-9).) Mole elaborated that if
20 those guys come, "they might not have anything or they might have
21 a stick, or if they have something" and someone interjected:
22 "what do you guys have?" And Mole responded, "Oh, we have this"
23 -- referring, as far as Cindy understood it, to the guns. (CT
24 819(12-16).)

25 Cindy said that the atmosphere in the group during these
26 remarks was one of light-hearted raillery. She said some of the
27 people in the group were "laughing and then they didn't believe
28 him 'cause like we thought he was joking around 'cause we didn't

1 [know] why he wanted [to] bring the guns in [to the Cafe] for."
2 (CT 854(8-11).) It was unclear whether petitioner was included
3 in the "we" and shared the general incredulousness and amusement
4 at Mole's remarks and conduct, but Cindy seemed to include all
5 the other people then present -- save for Mole -- in the scope of
6 her "we". (CT 854(8-11).) She did note that even "his [i.e.,
7 Mole's] friend thought he was joking around too" -- probably
8 referring to Tuan. (CT 854(1).)

9 Cindy told the Detectives that Mole kept both guns and that
10 she did not see him give either of them to anyone else. (CT
11 819(23-25), 861(2), 845(23).) Petitioner had a tight shirt on
12 and she "didn't see anything" in his waistband at any point after
13 the conversation outside the Cafe. (CT 859(11-22), 860(18-21).)
14 She did not see petitioner with a gun in the Cafe. (CT 845(23-
15 24).)

16 At no point in her police interview did she cite petitioner
17 or Dung as the author of any of the specific remarks she recalled
18 from the raillery inside the Cafe. Indeed, Cindy said Dung (aka
19 'CD') had not yet arrived. (CT 861(15), 862(7-12).) She reported
20 that she did not see Dung until after shots were fired. (CT
21 861(21-23), 862(7-18).) She recalled the petitioner, Dong Chi,
22 Mole, Tuan, Louie, Phuong, and her were at the table during the
23 above described remarks. (CT 861(10-13).) She also made clear
24 that she was "playing games" and that the others were intermitten-
25 tly singing throughout the interval in question. (CT 819(27)-
26 820(4), 854(15-16).) About 15 to 20 minutes after entering the
27 Cafe, Cindy and Phuong left to go to the McDonalds, leaving the
28 guys behind. (CT 820(7).) She saw Mole leave the Cafe to go to

1 the green Legend before she and Phuong left for McDonalds. (CT
2 863(10-28).)

3 Cindy told police that she was at the McDonalds for about an
4 hour. (CT 820.) After leaving McDonalds, while "walking" on the
5 sidewalk in front of the gas station on her way back to the Cafe,
6 Cindy heard three shots (CT 820(28)-821(12)) coming from the Cafe
7 parking lot. She continued to walk, but could not see what was
8 happening at that point. (CT 821(13-17.)) As they reached the
9 grass margin around the Cafe "all of [a] sudden we saw Dong Chi⁴
10 and" petitioner "running," coming out of the Cafe and towards the
11 liquor store. (CT 821(19-28), 822(26-27), 823(17), 848(22-25).)
12 She also saw Dung and Mole "start running" from a different
13 location. (CT 823(14).) She could see that CD (Dung) and Mole
14 were both carrying guns. (CT 825(10).) She did not see them
15 shooting, however. (CT 849(28)-850(8).) Cindy saw CD and Mole
16 run to petitioner and Dong Chi and give them the guns. (CT
17 842(14-23).) At one point Cindy said she did not actually see
18 the guns exchanged. (CT 825(22-23).) At other points in the
19 interview she said she did. (CT 834(15)-835(3), 846(21-26),
20 848(10-11).) But, she also said she never actually saw the guns.
21 (CT 838(7-19), 811(22-25), 825(2-23).) The purported witnessing
22 of an exchange of guns between Mole and CD to petitioner and Dong
23 Chi may be a case of what Cindy later described as "just putting
24 it together," i.e., putting together what people later said at
25 Shorty's with what she actually saw. (CT 863(22); See also
26 855(15)-857(11), 858(5).)

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Fn. 4: Cindy said Dong Chi and CD were different people. (CT
843(6).)

1 Mole then ran to the green Legend (CT 824(3)) and CD --
2 Cindy surmised -- ran to some other waiting car (CT 824(5-19)),
3 while petitioner and Dong Chi ran "to the back door to the coffee
4 shop." (CT 825(23-24).) When petitioner and Dong Chi emerged
5 from behind the coffee shop (Cafe), they ran to the green Legend
6 and the car drove away. (CT 825(22)-826(3).) Cindy later clari-
7 fied saying that the departure was delayed because other cars
8 were attempting to leave the scene and were in the Legend's way.
9 (CT 827(10-22).)

10 Cindy saw a white Honda Prelude leave the gas station (CT
11 846(20-21) in pursuit of the green Legend and heard "one or two -
12 more" gunshots (CT 826(3-20), 828(23-25) -- which Cindy believed
13 came from the people in the prelude. (CT 826(21)-827(9), 827(25)-
14 828(16), 828(24)-829(13).) Cindy saw at least two people in the
15 prelude. (CT 839(15).)

16 Cindy reported that she and Phuong then took a bus home.
17 (CT 830(7), 853(16-17).) Petitioner phoned her there at about
18 10:00 p.m. and later came with Tuan and Samantha in Tuan's car to
19 pick her up. (CT 830(15)-831(15).) She was taken to Shorty's
20 house. There was nothing said about the shooting in the car on
21 the way over. (CT 831(13-24).)

22 Mole, petitioner, Tuan, Louie, Samantha, and Shorty were
23 there when she arrived. (CT 832(1-6).) Dung (or 'CD') had not
24 arrived yet. (CT 832(9-10).) They were all talking about the
25 shooting, but "Mole was doing the talking." (CT 831(27), 832(20)
26 [emphasis added].)

27 Mole said he shot the victim because the guy was coming
28 "towards [him] with a stick and then I pick up the gun and shoot

1 him." (CT 832(20-21).) At another point during the interview,
2 Cindy summarized Mole's explanation as follows:

3 "They was [] running after Mole with a stick trying to hit
4 him. And I guess Mole got scared and tried to defend
5 himself." (CT 755(14-16).)

6 Mole "turned back" to face his attacker and "took it out and
7 shot it" -- and then CD came running and "he [i.e., Mole] gave
8 the other [gun] to CD." (CT 839(5-8), 840(3-10), 861(22).) Mole
9 said he shot twice. (CT 835(9-10), 832(25).) Mole also remarked
10 that he felt "weird like, when they were running away" but "then
11 like CD came and he gave [a] gun to CD" (CT 833(1-3)) and CD then
12 shot the guy once. (CT 833(20), 875(15).) Mole said at this
13 point the victim was down in the parking lot and in obvious pain.
14 (CT 833(25)-834(2).) So CD and Mole then ran to the back of the
15 coffee shop "to see if anyone was out there, but no one was."
16 "So, they went back ... and that's when everyone [from the Cafe]
17 was in the front already and that's when they [Mole and CD] run
18 toward Dong Chi and [petitioner] to give the gun." (CT 834(2-9),
19 840(19-23), 855(23)-857(12).) This is what she heard Mole say at
20 Shorty's house. (CT 834(9-10), 835(4-9).) The first thing that
21 she may have actually saw is the passing of the guns to petitioner
22 and Dong Chi. (CT 834(15-17), 835(1-3).)

23 The only relevant⁵ statement that Cindy said petitioner made

24 Fn. 5: At one point in Cindy's interview she said that petitioner
25 said he shot once and said that he did not hit the victim. (CT
26 841(22)-843(3), 847(24-28), 850(23).) However, this was irrecon-
27 cilable with her story, and the Detective's apparently recognized
28 that (CT 873(1-6).) Cindy said the victim was down before Mole
and CD passed the guns to petitioner and Dong Chi. (CT 859(3-
10), 842(1-7), 854(22)-855(9).) She said Mole ridiculed petition-
er's assertion saying that "how can you shoot him when ... he was
already down [] by the time we got to you guys?" (CT 873(3-5).)
(continued next page)

1 at Shorty's was that he and Dong Chi left the guns "in the back
2 of the coffee shop" under two garbage bags. (CT 836(1-25). Mole
3 then phoned Dong Chi -- who was not present at Shorty's -- "to
4 make sure where" the guns were. And, later, she heard Mole say
5 that Dong Chi had told him that Dong Chi had "put it" underneath
6 the bag. (CT 836(24)-837(28), 844(27)-845(13).)

7
8 b.
CINDY'S TRIAL TESTIMONY

9
10 Cindy testified that she arrived at the Cafe with petitioner
11 and "his friends" in the Legend. (RT 693(4-20).) She remembered
12 standing out front of the Cafe or liquor store with petitioner
13 and some others, who were talking. (RT 695(12)-696(11).) "CD"
14 was not there. (RT 695(28)-696(1).) She heard no talk about
15 guns nor did she see any guns. (RT 696(12-16).) She did remember
16 there was some of talk of a fight, though she could not remember
17 anything about it. (RT 696(17-18), 697(7-21).)

18 Cindy testified that while inside the Cafe she did not see
19 anyone display any guns. (RT 702(17-19).) She remembered seeing
20 petitioner, Mole, and Dong Chi in the Cafe. (RT 704(4-18).) She
21 did not see CD. (RT 704(19-20).) She did not hear any convers-
22 ations in the Cafe about what would happen if certain guys showed
23 up or any talk about using guns. (RT 765(11-20).)

24 At some point Cindy left the Cafe and went to McDonald's
25 with her friend Phuong. (RT 706(4-14).) Sometime later she

26 Fn. 5 (cont.): Also, Cindy did not hear any gunshots after CD
27 and Mole allegedly gave the guns to petitioner and Dong Chi. (CT
28 850(1-26).) The idea that petitioner shot the victim was also
inconsistent with the relevant testimony of all other witnesses
in the case and the jury's verdict. (See, ante, pp. 3-4.)

1 returned to the shopping center at San Felipe and Aborn with
2 Phuong after doing a little shopping elsewhere. (RT 753(14)-
3 754(5).) Everyone was leaving so she got in a car with petitioner
4 and they left. (RT 775(21-23), 753(14)-755(21).) She did not
5 hear any gunshots and did not see anybody with any guns. (RT
6 757(15-24).)

7 Cindy testified that later that night she went to Shorty's
8 house with petitioner. (RT 709(11-18).) People were talking
9 about what had happened at the shopping center earlier in the
10 day. (RT 709(26-28), 778(9-21).) Mole admitted he shot but no
11 one else did. (RT 710(1-7), 780(1-9).) Mole said someone was
12 coming at him with a stick or something, and then he shot. (RT
13 780(12-17).) Something was said about guns in the back. (RT 781.)

14 Cindy also testified that prior to the shooting at the Cafe
15 petitioner had told her that he fought with her cousin Kevin over
16 taking her out late. (RT 719(19)-720(13).) She said that when
17 petitioner and the other guys were talking about a fight out in
18 front of the Cafe, it was not about the guys petitioner had
19 fought right before. (RT 720(13-23).)

20 Cindy testified that the statements she made in her interview
21 with Detective Torres were coerced and untrue to the extent they
22 differed from her trial testimony. She said the Detectives just
23 took her from school and her parents did not know where she was.
24 (RT 716(22-24), 770(22)-771(3).) She was scared. (RT 716(16),
25 708(5), 717(7), 748(16-17), 770(28).) She said they held her
26 there for a long time and that they kept saying that she knew
27 everything, even though she didn't, and that she would go to jail
28 if she didn't tell them -- so she just said whatever she could

1 think of to appease the officers so that she could get out of
2 that room. (RT 707(19-20), 708(8-9), 708(28)-709(1), 716(15)-
3 717(4), 720(26-27), 721(14-16), 721(20), 722(10-11), 736(14-15),
4 738(4), 741(7-8), 748(9-15), 750(8), 765(24-27), 769(2-8), 771(16-
5 17), 772(2-5), 773(14), 793(6-17), 802(17-19), 803(6-8), 869(23-
6 25), 873(20-21), 873(26-28), 874(3-13), 877(22-26), 878(10),
7 879(16), 881(10), 700.)

8 Cindy said hearing the taped interview again during her
9 testimony hurt her. (RT 735(7-12).) She said the tape sounded
10 like she was volunteering information to the Detectives because
11 if she didn't cooperate she didn't know what they would do with
12 her otherwise. (RT 748(18-22).) Cindy explained that some of
13 what she said she personally saw in the interview was actually
14 just stuff she had heard about. (RT 757(15-27), 762(17-27),
15 773(17-25).) Other stuff she just made up. (RT 765(11-22),
16 768(25)-769(8), 793(6-17), 802(18-23).) She told the officers
17 what she thought they wanted to hear so she could get out of that
18 room. (RT 748(9-12), 804(1-7).)

19 Cindy also testified that her Vietnamese is poor. She under
20 was born in the United States, has taken no classes to teach her
21 Vietnamese, and understands just those "easy words." (RT 799(9-
22 25), 826(13-20), 879(21-24).) She said the interpreter at the
23 preliminary hearing was of no use because she couldn't understand
24 what he was saying. (RT 884(5-19).)

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2.
VU NGUYEN

a.
POLICE INTERVIEW

Vu admitted that he came down to be interviewed in an effort to help out his friend Tuan, who was in custody for the murder of John Van Nguyen. (CT 933(7-17), 934(17)-935(11).)

Vu told the police that he was with his friend, Tuan, at a local pool hall when Tuan decided to go to the Cafe to see Samantha, Tuan's girlfriend, who was employed there. (CT 903.) He did not have any inkling that there would be a fight at the Cafe. (CT 904(1).)

Vu recalled seeing petitioner and Dung talking in front of the Cafe when he and Tuan arrived. (CT 956(14-20).) He did not know whether Mole was with them at that time. (CT 956(22-23).) At various points in the evening, Vu saw Shorty, Mole, petitioner, and Dung inside the Cafe -- as well as 15 to 20 other people. (CT 904-06, 908, 911(25), 922(15-16), 957(1-4).) While he saw Mole, Dung, and petitioner together in the Cafe, he also recalled that they separated after 10 to 15 minutes. (CT 957(7-8).)

At some point in the evening, Vu and petitioner talked. Vu recalled petitioner saying something about "a girl problem" and "fighting over [a] girl." (CT 909(1-9).) Vu thought the girl being referred to was Cindy, petitioner's girlfriend. (CT 910(4-20).) Petitioner said he "see some other guy that not get along with him." (CT 908(16-17).) Petitioner saw a guy he did not get along with as that guy "drove past" the Cafe. In fact, Vu said "they saw each other." (CT 912(12-13).) Petitioner angrily

1 expressed the opinion that "they went home to get guns and
2 stuff." (CT 917(17-20).) Vu said the victim was a friend of
3 Cindy's cousin. (CT 923(1-2).) But, Vu claimed-not to know
4 Cindy's cousin from Adam. (CT 928(2-3).) Vu had heard that
5 petitioner fought with Cindy's cousin at Nguyen Trai, the pool
6 hall. (CT 927(1)-928(3).)

7 Sometime later, someone in the Cafe said they were going to
8 go and get guns. (CT 957(18)-958(10).) About 30 minutes after
9 that, while Vu was playing video games, he saw Son and Dung come
10 in with bulges under their T-shirts that looked like the handle
11 of a gun. (CT 913(15)-914(4), 920(10), 956(3-12), 958(12).) The
12 two youths then "looked around" in the Cafe. (CT 920.) Vu
13 interpreted their actions as an effort "to acknowledge and look
14 for ... their friends, so that if ... the other group decided
15 "come in and start a fight" they would "know where to get some
16 back up." (CT 920(21-25).) Five to ten minutes later, the two
17 "went over to the liquor store to play some video games over
18 there." (CT 921(2-4), 914(6-7), 958(19-26).)

19 About 40 to 45 minutes after petitioner and Dung's departure
20 Vu saw people sitting near the Cafe "window start running towards
21 the back" of the Cafe. (CT 914(17), 921.) So Vu did, too. At
22 the back "he looked out the window and he saw petitioner and
23 Dung" "racking [or loading] rounds into their gun." (CT 914(17)-
24 915(13), 921(22-25), 955(22-26).) He later said -- under the
25 influence of the Detective's remarks -- that they were unloading
26 the guns. (CT 928(18).) However, Vu reported that he is near-
27 sighted and therefore cannot be sure what they were doing with
28 the guns. (CT 928(16-17).)

1 Upon seeing the nature of the activity behind the Cafe, Vu
2 and his friends Hung and Tuan ran out the front door. (CT
3 915(25)-916(2).) As they exited "they saw a gun laying on the
4 ground." (CT 916(3-4).) The trio jumped in Tuan's (i.e., the
5 'black car' that Cindy spoke of) and Mole jumped in after them.
6 (CT 916(4-16), 922(5-9), 961(17-22).) Mole announced that some-
7 one had died. (Ibid.) Mole did not say anything else about the
8 shooting in the car. (CT 923(4-7), 955(21).)

9 Eventually, the foursome arrived at Shorty's. (CT 917(1-
10 4).) Once there, "everyone" -- except Mole and Dung -- was
11 saying that Mole and Dung had done the shooting. (CT 917(6)-
12 918(26), 923(11-13), 925.) Dung did say that the victim ran up
13 to him with a bat ... and he [Dung] got really close to the bat;
14 that's why he was scared." (CT 923(24-26), 926(24), 963(5-19).)
15 But, Dung stopped short of saying he shot him. (CT 924(6-7).)
16 Mole neither denied or confirmed that he shot the victim but just
17 let everyone talk. (CT 925-926(8), 947, 964-65.)

18 Detective Torres testified as to what Vu said in a separate
19 interview for which no usable tape or transcription was available.
20 Torres said that that interview was just a "cursory conversation."
21 (RT 1861(12-26).) He explained that Vu "did have some problems
22 communicating with me. Maybe he didn't understand some of the
23 questions I asked him" (RT 1848(22-24)), which is why he arranged
24 to have Detective Pham available to interpret for the second
25 interview. (RT 1848(10-21).) Despite his realization that Vu
26 had a "puzzled look" to some question (RT 1778(16-17)), and his
27 belief that an interpreter was needed (RT 1778(18-20), 1848(18-
28 21)), Detective Torres felt it was nonetheless a "reliable inter-

1 view" and the statements he attributed to Vu were clearly under-
2 stood. (RT 1848(28)-1849(9).)

3 Detective Torres testified that Vu told him that prior to
4 the shooting he had seen petitioner in possession of a handgun at
5 the Cafe. (RT 1796(11-12).) Vu told him petitioner had some
6 type of problems with the victim in the past. (RT 1796(27-28).)
7 Vu told him that petitioner and Dung left the Cafe when he (Vu)
8 saw the victim drive by. (RT 1797(5-7).) Dung and petitioner
9 returned, the victim drive by again, and Dung, petitioner, and
10 Mole then exited the front of the Cafe. (RT 1797(13-16).) Vu
11 also stated that Dung and petitioner had at some point left to
12 get guns for protection. (RT 1853(16-26), 1862(2-4).) Vu told
13 Detective Torres that shortly after the shots were fired people
14 were leaving the Cafe. He went to the rear of the Cafe and saw
15 petitioner and Dung standing near a dumpster each unloading a
16 gun. (RT 1816.)

17 b.

18 VU'S TRIAL TESTIMONY

19 Vu testified that Tuan was his friend and he wanted to help
20 him. (RT 1344, 1401, 1419-1423.) He was reluctant to testify
21 (RT 1251-1255, 1346-1348), and he frequently claimed to not
22 remember or deny what he told the police about the shooting. (RT
23 1272-1279, 1285, 1304-06, 1312, 1319-22, 1344-46, 1349, 1361,
24 1372.) He also claimed his statement was inaccurately translated.
25 (RT 1340-1343, 1382-1383.) He claimed the basis for his testimony
26 that Dung and Mole were the shooters was a street rumor. (RT
27 1381-82, 1395-97.) Vu said that he is nearsighted. (RT 1373.)
28

3.
HUNG TRAN

a.
POLICE INTERVIEW

At the outset of his interview, Hung Tran told the Detectives that he had come to help his friend Tuan, who was then in custody under suspicion of being Mole's accomplice in the shooting. (CT 974.)

Hung recalled that, on the day of the shooting, he and Tuan dropped Samantha off at work at about 4:00 p.m. and then went to play pool for a couple of hours. Thereafter, they went to pick up Vu Nguyen at his house and took him with them to the Cafe. (CT 978(27), 1032(22-27).) Tuan was driving a black accord. (CT 979(4-12).)

Hung did not recall seeing anyone he knew standing out in front of the Cafe when they arrived. (CT 986(12-14).) Hung said that he was at the Cafe with Vu and Tuan for about "an hour or something" before everyone in the Cafe started running to the door to look and to leave. (CT 979(24-27), 981(4-7), 982(14-15), 983(3-4).) Hung did not hear any shots. (CT 982(14).) The trio then got up from where they were sitting and went out the front door of the Cafe. (CT 983(1-2), 983(5-7), 984(4)-985(1).) They did not first go to the back of the Cafe (as Vu had said) and they did not see anybody with guns from the Cafe. (CT 983(5-10), 986(4-10).) As the trio left the Cafe, Hung saw a person on the ground. (CT 979(27), 982(21), 983(9), 983(25).) The trio then got in the car, with Hung taking the wheel on Tuan's request. (CT 1032(15-25).) Mole, known to Hung as Tinh (CT 1022(5-28),

1 1025(1-5), 1036(23-26)), got into the back seat of the black
2 accord before they left. (CT 986(16-23), 980(5-27).) This was
3 the first time that evening that Hung recalled seeing Mole. (CT
4 986(12-23), 988(3-13).) At Tuan's direction, they then drove to
5 McKee Avenue and rented a video. (CT 989-990, 993(10), 1002(24-
6 27).) Mole had nothing to say in the car beyond remarking that
7 someone had been shot and killed. (CT 993(5), 1002(1-12),
8 1003(3-13).) Tuan paged Samantha from the video store and she
9 met Tuan there. (CT 995.)

10 From the Video store they went to Shorty's. (CT 994(1+3).)
11 While at Shorty's Mole said he chased and shot the victim because
12 the victim first chased him and tried to hit him or his friend
13 (i.e., Dung) with a bat. (CT 998(3-20), 1001(3-8), 1000(5),
14 1006(3), 1016(18)-1017(2).) Mole said he and Dung both shot the
15 victim. (CT 1016(2-3), 1005(10-25).) Mole said he shot three to
16 four times. (CT 1006(9-10), 1034.) Under heavy suggestion from
17 the interviewing detective, Hung eventually said that Dung said
18 he shot the victim, too. (CT 1008(16-23), 1016(1-3).) Dung
19 purportedly explained that he shot because "they wanna beat him
20 up" because he (Dung) had fought the guy before. (CT 1016(7-
21 13).) Mole said the victim knew Mole was one of the guys who the
22 victim had fought with at the pool hall the day before and that
23 the victim wanted to get him back. (CT 1017(1-4).) Mole said he
24 ran to the back of the Cafe after he shot the guy. (CT 999(15)-
25 1000(23), 1015(16-27).) Hung did not have any information about
26 what Mole did with the guns. (CT 1003(17-19).)

27 While at Shorty's, Hung "thinks" he heard that the fight was
28 over Son's girlfriend. (CT 1008(26)-1009(13).) Hung heard that

1 somebody had beat up petitioner and that they wanted to get back
2 at him. (CT 1010(4-11).) But, Hung was not told if the guy with
3 the bat had been the one who beat petitioner up. (CT 1010(5).)
4 He said he did not know the guys who allegedly attacked petition-
5 er. (Ibid.) Hung's impression from what he heard at Shorty's
6 was that petitioner, Dung, and mole were on one side and the guy
7 with the bat was on the other. (CT 1010(12-17).) However, Hung
8 did not think petitioner was in Shorty's house while these
9 matters were being discussed. (CT 1017(6-20), 1009(17), 1036(8).)
10 In fact, the other guys there did not say anything about petit-
11 ioner being involved in the shooting. (CT 1036(18).) -

12 Hung recalled being in the pool hall a couple days before
13 the shooting with Tuan and Vu and seeing Mole, Phuong, and Dung
14 fighting "with some other guy, that one, with the girl." (CT
15 1011(2)-1012(3).) Hung, however, could not say if the guy that
16 got killed was at the pool hall. (CT 1012(5).) He was "going up
17 to the front door" of the pool hall when the fight broke out.
18 (CT 1012(26-27).) Petitioner was at the pool hall, too. When
19 the attacking group "came in they wanted to beat" Petitioner up.
20 (CT 1012(19-22).) They did not say anything, however. They just
21 entered the pool hall and began beating up petitioner. (CT
22 1012(24-25).) Hung heard the fight was over Cindy, but he did
23 not know this for a fact. (CT 1013(4-9), 1014(2-22).) Hung did
24 not know Cindy but his understanding was that the attacking group
25 had a member who was related to Cindy, possibly as her boyfriend.
26 (CT 1013(12-27).) Hung said he only knew the guys with petition-
27 er, i.e., the defenders. (CT 1013(26-27).)
28

b.
HUNG'S TESTIMONY

Hung testified that Tuan is a long time friend of his. (RT 1452.) He affirmed the truth of his taped statement played for the jury. (RT 1490-92.) However, he testified that at Shorty's only Mole admitted any involvement in the shooting. (RT 1605-09, 1611.) Petitioner said nothing there. (RT 1482-85.)

Hung testified that he and Vu had gone to the police station to help their good friend Tuan who was in jail for the shooting. They had discussed the story they would tell the police and Vu told Hung what to say. Hung had visited Tuan in jail many times and had talked to his father about Tuan's situation. (RT 1494-96, 1573-76.) Hung was frightened in the interview because he did not know what Vu had said, and because the police told him he could be a suspect. He thought it was possible that the police were telling him what they knew so he could know what to say. (RT 1579-80.)

Hung testified that "possibly" what he told the police about the shooting was what he had heard from friends on the street, and was not sure whether he heard about the shooting from Mole or from someone else. He seemed sure that Dung never said that he had shot anyone, and could not remember if Dung was even present when Mole said he and Dung had shot. (RT 1563-69.) In the police interview, Hung said that "Dung said there was a shooting" but he meant that Mole said that, and that everything he heard about the shooting that night was from Mole. (RT 1570-73.)

4.
TUAN HOANG

a.
POLICE INTERVIEWS

The day after the shooting, the detectives interviewed Tuan Hoang (aka: 'Dracula' -- because of his two prominent teeth). (CT 1142(12-14).) Tuan was in custody under the theory that he was Mole's accomplice in the shooting. (CT 1062-63.)

Tuan recalled arriving at the Cafe at about 4:00 p.m. in the company of Hung and Vu, friends of his for several years. (CT 1064(3-18), 1099-1101.) The trio sat at a table alone. (CT 1064(1-20), 1146(1-3).) At an adjacent table he saw Louie (four eyes), Louie's friend, Cindy, petitioner, Mole Dung and Dung's friend. (CT 1103(20)-1104(7), 1146.) Tuan explained that he did not "know," associate with, or talk with Mole while at the Cafe - he just knew his name. (CT 1077(10)-1079(1), 1099(8-20), 1120(2).) Tuan said he did not know anyone named Dong Chi. (CT 1114(9-25).) He said that he did not interact with Louie at any point while at the Cafe. (CT 1092(1-23).) Tuan did not know "CD" and had never heard Dung called by that name. He had known Dung for less than a month at the time of the shooting. (CT 1113(8)-1114(8).) He recalled talking to petitioner "a couple of times" -- he had known petitioner and Cindy for only about two weeks. (CT 1095(23), 1098(11-26), 1099(6).)

Tuan neither saw, nor heard any mention of, guns while at the Cafe and did not see the shooting. (CT 1148(3-20), 1073(10-13).) He said that neither Hung nor Vu said to him anything about seeing two people behind the Cafe with guns. (CT 1155(20-

27), 1065(24-26).) Tuan did not go around to the back of the Cafe. (CT 1065(19).) He said he did not know why the shooting occurred and he did not know who was killed. (CT 1081(20-25).) Tuan denied being in any group allied against a group allied with one of Cindy's relatives. (CT 1094(3-16).) He denied that Cindy or petitioner told him about a fight petitioner was in. (CT 1104(11-25), 1105(12).) Tuan did say that "they just say their having a fight" -- but he did not explain to whom "they" was meant to refer. (CT 1104(23), 1105(3-6), 1105(22).) Tuan did not know who was in the parking lot during the shooting because he was inside the Cafe when it occurred. (CT 1109(6).) He saw everyone in the Cafe begin to run and he left the Cafe with them and got into the passenger side of his car, a black Accord. (CT 1109(14-20), 1064(14)-1065(19), 1070(11-26), 1072(7-26).) Hung drove and Vu got in the back. (CT 1073(16)-1074(6).) Mole also got into the back. (CT 1116(12)-1117(9), 1143-44.) There was no one else in Tuan's car. (Ibid.) Tuan recalled seeing a white guy taking the license plate number of his car down. This did not worry him because he knew he was uninvolved. (CT 1066(17-18), 1072(16).) Tuan denied handling a gun on the day of the shooting. (CT 1083.)

From the Cafe they drove to a pool hall and then to Lee's Sandwich, which was adjacent to a Video store. (CT 1117(10-12), 1119(8-19), 1121(3-8).) At Lee's Sandwich he paged his girlfriend Samantha. She then got a ride from a friend of hers to where Tuan was. (CT 1086(11-26), 1121(4).) Next, Tuan called Louie, who was at Nguyen Trai -- the pool hall, saying that he wanted Louie to meet them at Lee's Sandwich so that Louie could follow

1 Tuan home. Tuan wanted to drop off the black Accord he was
2 driving at home. (CT 1088(3)-1091(27).) Mole and Shorty did not
3 want the car sitting outside Shorty's house since someone had
4 taken the license plate down. (CT 1122(20-27).) Tuan heard
5 nothing from Mole about the shooting until they talked at Shorty's
6 house. (CT 1117(11), 1118(24), 1119(24)-1120(23).)

7 At Shorty's he did not recall hearing petitioner "saying
8 anything about the shooting." (CT 1130(5-12).) In fact, Tuan
9 said that petitioner had to ask about it to find out what
10 happened:

11 "[petitioner] just like asked, you know how it happened out
12 there and all that to Dung and Tien [i.e., Mole] and all
13 this is how they told out the story.

14 Q: Can you remember [petitioner] saying that he did some-
15 thing too?

16 A: No ... He didn't say anything about anything." (CT
17 1130(5-12).)

18 Dung said he and Mole were driving a car (apparently Dung's green
19 Legend -- CT 1139(1-15)) and when they "came back" to the Cafe,
20 Dung saw "those people was there" "driving around" in a car "in
21 the parking lot." (CT 1138.) Dung then said, "You wanna get the
22 gun?" (CT 1138(3), 1139(2-4)) -- and they parked and "come out"
23 of the car. Next -- and this part was according to Mole -- one
24 of the opposing group "holding a baseball bat" "chased" Mole and
25 Dung across the parking lot and "then they [i.e., Mole and Dung]
26 turn around" "with the gun out" and shot. (CT 1139(17)-1140(5).)
27 Tuan did not recall if they said how many times they shot. (CT
28 1140(6-23).) Mole then said they "ran" to the "back [of] the

1 bank." (CT 1140(25), 1141(5).)

2 Tuan did not hear -- or, perhaps, was not told -- what they
3 did with the guns. (CT 1141(3)-1142(6).) Before Tuan left he
4 witnessed petitioner give \$20.00 to Louie with the request that
5 Louie (four eyes) rent a motel room because petitioner did not
6 want to go home. (CT (1126(17)-1128(5), 1132(10-22).) Other
7 people may have chipped in. (Ibid.) Tuan had nothing to do with
8 those arrangements. He was broke and did not have a valid ident-
9 ification to use to rent a room. (CT 1129-1132.) By this time
10 Tuan realized how much trouble the people he was associating with
11 were in and decided to go home. (CT 1133-34, 1144.)

12 Tuan agreed that there had been a fight at the pool hall
13 while he was there a couple days before the shooting, but did not
14 relate any details as to who the combatants were or what the
15 fight was over. (CT 1136(20)-1137(4).)

16 b.

17 TUAN'S TESTIMONY

18 Tuan Hoang was arrested on May 23, 1996, and charged with
19 Tong Nguyen's murder. (RT 1775, 1837-38, 1876-77.) Tuan was
20 released from the charges between September 12 and 23, 1996. (RT
21 1776-77, 1876-77, 1985.)

22 Tuan testified that on the day of the shooting he went to
23 San Fransico with his girlfriend Samantha and Hung Tran. Hung
24 drove as Tuan's license was sespended. (RT 1880-1883.) They
25 returned to San Jose to drop Samantha off at the Cafe, went to a
26 pool hall, then picked up Vu Nguyen. (RT 1881, 1883-84.) Then
27 they went to the Cafe. He saw petitioner, Dung, Mole and Cindy,
28 among others, present at the Cafe. (RT 1888, 1891-95, 1903-09.)

1 Petitioner, Dung, Mole, and Cindy were sitting at a table nearby
2 Tuan. (RT 1895, 1903, 1909.)

3 At some point Dung and Mole left the Cafe. Before they
4 left, Tuan heard a male voice say, "those guys out, you know, out
5 there," referring to outside the Cafe. (RT 1897, 1903-09.)
6 Sometime thereafter, someone shouted that there had been a shoot-
7 ing. (RT 1909-10.) Petitioner was inside the Cafe at a table at
8 this time. (RT 1908-13.) There was commotion and panic in the
9 Cafe. (RT 1916.)

10 Tuan said after the shooting he went to his car and arrived
11 there about the same time as Hung and Vu. (RT 1916-19.) On his
12 way he saw someone on the ground. (RT 1916-17.) The three men
13 got in the car, along with Tuan's sister Mai and Phuong Chu. (RT
14 1920.) As the car pulled away, Mole also got in. (RT 1920-21,
15 1927.) Tuan admitted lying to the police, immediately after his
16 arrest, about Mole getting in the car. He feared the police
17 might think he was Mole. (RT 1928-31, 1933-35.) Tuan noticed a
18 man writing something down as Hung drove off. (RT 1922-24,
19 1932.)

20 Ultimately, Tuan ended up at Shorty's. Petitioner, Dung,
21 Mole, Cindy, Hung, Vu, Samantha, and Nhue Giang (Four Eyes) also
22 were present. (RT 1948-50.) Both Mole and Dung admitted getting
23 the guns and shooting the victim. (RT 1951-57.) There was a
24 discussion of renting a motel room for petitioner, who said he
25 did not want to go home. (RT 1957-59, 1965.) Petitioner gave
26 Nhue money to rent a room. (RT 1958.)

27 Tuan and Samantha went with Nhue to pick up Tuan's car. (RT
28 1960, 1963.) Tuan had left his car at the sandwich shop they

1 stopped at earlier. Shorty was aware that someone had written
2 Tuan's car's license number down and he did not want the car at
3 his house. (RT 1947, 2016-18; see RT 1939-45.) Nhue followed
4 Tuan and Samantha home in order to rent a room. Tuan was arrested
5 in Nhue's car after he parked his own vehicle. (RT 1963-66,
6 2021-22.)

5.

NHUE GIANG

9 Nhue (Four-eyes or Louie) Giang testified that he drove
10 alone to the Cafe. (RT 1134, 1138-39.) He said he sat by
11 himself. (RT 1149.) He said Dung was at the Cafe, but he did
12 not remember if petitioner or Mole were present. (RT 1141.)

13 Nhue testified that Tuan was in the Cafe, not the parking
14 lot, when the shooting occurred. (RT 1156-60.) He also told
15 this to the police in a pretrial statement. (RT 1244-46; CT
16 898A.) He said everyone in the Cafe ran toward the door, and he
17 saw Tuan running too. (RT 1157-58, 1184.)

18 Nhue said he drove away in his red Honda Accord, going to a
19 friend's house. (RT 1136-37, 1160-61, 1164, 1170, 1200-02.)
20 When he left the mall, he saw that someone had been hurt. (RT
21 1162, 1197.) Tuan telephoned him at the friend's house, telling
22 him to follow him home and rent a motel for him. (RT 1164.)
23 Nhue went to Shorty's, where he picked up Tuan. (RT 1165-67,
24 1222.) Stating he did not want to get involved, Nhue said he did
25 not remember who was at Shorty's or that anyone there spoke of
26 the shooting. (RT 1166-68.)

27 From Shorty's, Nhue followed Tuan as Tuan (with his girl-
28

1 friend Samantha) drove home. Tuan spoke of obtaining money for a
2 motel room Tuan then got in Nhue's car and the police arrived
3 and arrested them. (RT 1202-04.)

4 Nhue testified that he heard from "people" about a fight at
5 a pool hall which was over a girl -- "they told me about Cindy" -
6 - he heard petitioner got beat up. (RT 1149(9)-1151(7), 1228(22)-
7 271.) He was not present at any fight, he was at school. (RT
8 1152(25)-1153(12), 1154(27)-1156(1).) Someone told him about the
9 fight and who was involved. (RT 1153(13)-1154(7), 1179(22)-
10 1180(8), 1228(22)-1229(2).)

11 6.

12 JOHN NGUYEN

13 Jonh Nguyen testified that his brother Tong telephoned him
14 and requested that he come to pick him up at the Cafe in the
15 strip mall. (RT 195-96, 229.) John said he drove to the mall in
16 a Honda Civic, parking near the liquor store next to the Cafe (RT
17 197-98), though in a statement to police about an hour after the
18 shooting, John said a friend (Von Tran) had driven him to the
19 mall. (RT 385-391; see RT 226-227, 267-68.)

20 While John was standing between the Cafe and the nearby
21 liquor store, he saw two men. At first the men were walking,
22 then they started running. John then saw his brother, who was
23 being chased by these two men. He saw nothing in Tong's hands.
24 (RT 198-200.) The two pursuers, both Vietnamese, each had a gun
25 they obtained from their waistbands. (RT 200-01, 214, 233-35,
26 278.)

27 His brother and the two pursuers ran behind a van where John
28

1 lost sight of them. He heard three of four shots, then four or
2 five more. One group of shots was louder than the other; one
3 sounded like it was from a .22. (RT 213-16, 231-32, 333, 393.)

4 After the shots, the two men ran by the mall's Wells Fargo
5 Bank and out of John's sight. (RT 216.) A red Honda CRX drove
6 to the area where the shooters had fled, but John did not know if
7 they entered the car. (RT 217-18, 255, 329-32, 393.)

8 John described one of his brother's pursuers as skinny,
9 about five feet five or six inches tall, with a mole on his lip.
10 This man wore green pants and a white T-shirt. His hair was
11 shaved on the sides of his head, and hung down to his eyebrows in
12 front. (RT 201-02; see RT 392.) John was familiar with this
13 man, having seen him before. (RT 203-04, 335.) He identified
14 the man as Mole. (RT 222-23, 1806-07, 1834.)

15 John described the second pursuer as about the same height
16 as Mole. (RT 273, 392.) This man wore blue jeans and a blue
17 flannel or Pendleton shirt. (RT 201, 276, 392.) John testified
18 he got only a slight glimpse of the second man's face (RT 204,
19 237), though in his interview with police right after the shoot-
20 ing he said that he did not see the second man's face and could
21 not identify him. (RT 239, 243.)

22 On June 12, 1999 John was shown a photo line-up containing
23 petitioner and selected him as the second man. (RT 224, 1801-02,
24 1807-08.) John said he was 80 percent sure of this identifica-
25 tion. (RT 339.) At the preliminary hearing John was unable to
26 say whether petitioner or Dung was the second man. (RT 341-42.)
27 Nevertheless, John testified that he was 100 percent certain that
28 Dung was the second man (RT 346, 359), and that he recognized him

1 as having driven the green Legend. (RT 204, 213.)

2 The day before the shooting, John and his brother Tong were
3 in a Honda Civic on the Capitol Expressway. A green Legend came
4 alongside the Civic. Mole and Dung, the driver, were in the
5 Legend, along with other Vietnamese persons. The persons in the
6 Legend cursed at Tong, and one of them gestured toward him with
7 his hand shaped like a gun. (RT 206-13, 250-53, 394-96, 411; CT
8 703-705, 707.)

9 7.

10 PHUONG CHU

11 Phuong testified that she was Dung's girlfriend, but had
12 only known him a week or two. She said his nickname was "CD"
13 which stood for Co Dung and meant "lonely." (RT 894-99.) On the
14 day of the shooting, Dung picked her up at her school in his
15 green Legend. They drove to Dung's house with petitioner, Cindy,
16 Mai Hoang (Tuan's younger sister), and Mole. (RT 975-80.) At
17 Dung's, they sang karaoke then drove to the Cafe. (RT 980-86.)

18 Phuong testified that she heard no discussion about a fight
19 at Dung's or later at the Cafe, but was impeached with her
20 preliminary hearing testimony that the people at Dung's talked
21 about a fight they had been in the day before. (RT 987-98, 1029-
22 1030.)

23 When they arrived at the Cafe, everyone went inside, and
24 Phuong saw Tuan, Hung, and Vu there. (RT 989-90.) She sat at a
25 game table and played a game with Mai. (RT 993-95.) Petitioner
26 sang karaoke. (RT 1131.) It was very loud at the Cafe. (RT
27 1049-51.) At some point, someone told them to "Go home now," so
28

1 she got up to leave. (RT 998-1000.) She saw petitioner, Dung,
2 Tuan, Vu Hung, Mai, Cindy and Mole in the Cafe as she left out
3 the front door. (RT 999-1004, 1008-12.) She left in Tuan's
4 black Honda Accord with Mai because she wanted to go with Mai.
5 Hung drove the Accord up, and she, Mai, Tuan, Hung, Vu and Mole
6 got in at the same time and Hung drove away. (RT 1014-15.)
7 Phuong did not know that a shooting had taken place. When they
8 drove to Lee's Sandwich Shop, she overheard talk about a shooting
9 at the Cafe. (RT 907, 1084-86.) Tuan drove her home with Mai
10 and Hung. Vu and Mole stayed at the sandwich shop. (RT 1102-
11 06.)

12 Phuong said she did not go to Shorty's. (RT 1104.) She
13 said Dong Chi was petitioner's friend. (RT 1117.)

8.

JIM DUNCAN

16 Jim Duncan was parked outside the Wells Fargo ATM next to
17 the Cafe. He heard some popping noises and in his outside rear-
18 view mirror saw a young man fire three to five rounds, then run
19 in his direction. Duncan got out of his car and saw another
20 person with a gun running in front of the shooter; both ran
21 around the building. (RT 2111-18.) Duncan ran to the victim who
22 seemed dead. An explosion of young Vietnamese people came out of
23 the Cafe and ran into cars. Duncan tried to write down as many
24 license numbers as possible. (RT 2120-22.) He saw a car near
25 the Cafe trying to exit, and then saw the shorter of the two get
26 into the car; the taller one, and the actual shooter, got into
27 the back seat on the passenger side. He noted the license
28

1 number. (RT 2128-31.) He saw a dark car with at least four
2 people in it with something like a bat in the back window; they
3 had been observing the action and then ran over a curb twice
4 trying to get out of the lot. (RT 2124.) Later at the police
5 station, Duncan identified a photo of Tuan as "the one that fits
6 the best description" of the taller shooter. (RT 2135.)

7 9.

8 ELAINE DUNCAN

9
10 Jim Duncan's wife, Elaine, was standing at the ATM when she
11 heard popping sounds and she turned around. (RT 2224-26.) She
12 saw a thin, young, Asian man with floppy hair, shooting at
13 someone. (RT 2226-29, 2239-40.) The man was about five-seven,
14 120 pounds. He wore dark pants and a light shirt. (RT 2229-30,
15 2241-42.) Ms. Duncan saw a second person as well, but she was
16 not paying close attention. she crouched down. (RT 2232.) She
17 said the two men moved away, out of sight. (RT 2233-34.)

18 Ms. Duncan also noticed a car containing at least five
19 people and a bat in the rear window. This car had difficulty
20 pulling out of a parking space. She could not say if the car was
21 present during the shooting. (RT 2234-36, 2244-45.)

22 10.

23 YVETTE CORONA

24 Yvette Corona was in line behind Elaine Duncan at the ATM.
25 She heard gunshots and saw a man with a gun in his hand. He wore
26 a blue t-shirt and khaki pants and he ran out of sight. She did
27 not see a second person. (RT 2315-19.)
28

11.

ANNA MONTOYA

Anna Montoya was driving by the strip mall at 7:30 p.m. and heard loud noises. She heard screaming and saw a slender Asian man in a blue collared shirt running. She called 911 to report this when she arrived home. (RT 2281-92.)

12.

TASHA KADAH

Tasha Kadah was walking home when she heard popping noises and saw a bunch of teenagers running. She ran across the street and saw boys in baggy pants with long bangs running around the bank. She did not see anyone with a gun or pipe but had a vague memory of a bat. (RT 2509-23.)

13.

LEWIS BANKS

Lewis Banks was coming out of the convenience store next to the Cafe when he heard the shots. He got in his truck. He saw a red, two seater, Toyota MR2 go over an island or planter box as it drove off. (RT 2428-31, 2435, 2439.) There was a black Honda Civic containing about four people behind this car. (RT 2435-36, 2444.) Banks saw a lot of people fleeing on foot and in cars. (RT 2437-38.)

14.

WILLIE EAST

Willie East was pumping gas into his car when he saw two Asian males chasing a third Asian male who had a two to three

1 foot object in his hand, like a pipe. (RT 2464-68.) One of the
2 chasers had something in his hand. East heard four or five shots
3 which were apparently from different guns. (RT 2473-74.) He
4 described one shooter as two or three inches taller than the
5 other. (RT 2173-76.) ~~Both~~ shooters ran behind the Wells Fargo
6 Bank. (RT 2480-81.) Cars were leaving the parking lot within
7 the minute. (RT 2499-2500.)

8
9 15.

AMY NGUYEN

10 Vietnamese interpreter Amy Nguyen listened to the audio-
11 taped conversation between Hung and Vu in the police station
12 hallway. (RT 2380-81; see RT 2678-80, 2682-85.) Ms. Nguyen said
13 she heard one of the speakers doing most of the talking. He
14 stated that if they should be asked what clothing they were
15 wearing, they should say they do not remember. He also said he
16 would do anything to help Tuan. (RT 2383-86.)

17
18 16.

OTHER EVIDENCE

19
20 Tong Nguyen was shot four times. (RT 599.) One shot struck
21 him in the outside of the left leg above the knee. A second shot
22 struck him in the back of the right leg. (RT 600-03.) A third
23 shot entered his abdomen, and traveled up his body at a sharp 70
24 degree angle. (RT 606-09.) The fourth wound was to the victim's
25 left back, and traveled at an upward 30 degree angle. (RT 609-
26 10.) The torso wound bullets were recovered. (RT 610.) None of
27 the shots left any stippling, soot, or powder on the wounds. (RT
28 618-19.)

1 Tong's face and hands had fresh bruises. These could have
2 been sustained in a fall or a fight. (RT 611-12, 620-30, 632-
3 33.)

4 Officer John Robb arrived on the scene at about 7:30 p.m.
5 (RT 148-49.) He observed the victim on the ground between two
6 cars, one of which was Dung's green Legend. (RT 150.) The only
7 blood in the mall was near the victim. (RT 434-35, 573.) A
8 piece of pipe was found nearby. (RT 153-55.) No other weapons
9 were found in the vicinity. (RT 160.) A fresh skid mark was
10 about 50 feet from the pipe. (RT 155-57.)

11 Officer Rudy Hernandez arrived on the scene at about 7:28 to
12 7:38 p.m. (RT 359-60.) He searched a dumpster behind the Cafe.
13 The Cafe's back door was about 75-80 feet from the dumpster. (RT
14 361-65, 369-70.) The dumpster was between the Cafe and the Wells
15 Fargo Bank. (RT 371.) In the sleeve of the dumpster, where a
16 forklift picks it up, Hernandez found three guns. (RT 364, 371,
17 373.) Two were revolvers, one was a semi-automatic. (RT 366.)
18 One revolver was a cocked .357. (RT 366-67, 375.) The other
19 revolver was a .22. (RT 366-67.) The semi-automatic was a Ruger
20 .22 and contained a fully loaded clip. (RT 366-67, 376.)
21 Hernandez found no ammo, spent shells, or cartridges. (RT 376,
22 379.) Only the Ruger would eject casings. (RT 382.)

23 Two knives -- one a badly corroded hunting knife, the other
24 a chef-style kitchen knife -- were found outside the mall's lot.
25 Neither contained blood or identifiable fingerprints. (RT 485-
26 86, 540-41, 554-58, 560, 1639, 1645-46; see also RT 1978-81.) No
27 blood or fingerprints were found on the recovered pipe. (RT 482-
28 85.)

1 Only one fingerprint was found on the recovered guns. This
2 print was on the .22 automatic and could not be identified. (RT
3 1697, 1705-08, 1734-36, 1745-46.) The bullets recovered from the
4 victim were fired from the recovered .22 revolver. (RT 505-06,
5 1665-66, 1701-03.)

6 The .357 revolver contained five live rounds and one expen-
7 ded casing. (RT 446-47.) A live round was in position to fire
8 when the weapon was found, indicating the gun's action had been
9 cocked after the last bullet had been fired. (RT 452-54.)

10 The .22 revolver had nine cylinders, and contained seven
11 expended casings and two live rounds. Unlike the .357, there was
12 no live round under the gun's hammer. (RT 467-68.)

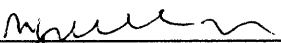
13 Mole's fingerprints were on the outside and inside of Dung's
14 Legend. (RT 1736-37.) Letters from Cindy to Dung, dated March
15 and April 1996, were in the Legend. (RT 492-96.) Also in the
16 car were a traffic ticket issued in petitioner's name for not
17 wearing a seatbelt on April 27, 1996, and items belonging to
18 Phuong Chu and Mai Hoang. (RT 498-503.)

19 Petitioner's fingerprint was found on glassware in the Cafe.
20 (RT 488-89, 525-26, 1748-49.) Petitioner presented himself to
21 the police voluntarily less than three weeks after the shooting.
22 (RT 1789.)

23 Gunshot residue tests were performed on Tuan and Nhue after
24 their arrests. Though molten lead, barium, and antimony particles
25 were found on there hands which are consistent with gunshot
26 residue, they were not in the unique combination that would
27 conclusively show that they had been deposited by gunshot. (RT
28 2254, 2256, 2263-65.)

1 Respectfully Submitted,

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Son Hoang Nguyen

4 Dated: June 28, 2008.

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